General Truck Drivers, Warehousemen and Helpers, Local 467, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America *and* Mike Sullivan & Associates, Inc. and Beaumont Concrete Company. Cases 21-CE-282 and 21-CE-287

December 16, 1982

DECISION AND ORDER

CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On May 21, 1982, Administrative Law Judge Gordon J. Myatt issued the attached Decision in this proceeding. Thereafter, the Respondent, General Truck Drivers, Warehousemen and Helpers, Local 467, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, General Truck Drivers, Warehousemen and Helpers, Local 467, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, agents, and representatives, shall take the action set forth in the said recommended Order.

DECISION

STATEMENT OF THE CASE

GORDON J. MYATT, Administrative Law Judge: Upon charges filed by Mike Sullivan & Associates, Inc. (hereafter called Sullivan), in Case 21-CE-282 on January 26, 1981, and by Beaumont Concrete Company (hereafter called Beaumont) in Case 21-CE-287 on March 31, 1981, respectively, the Regional Director for Region 21 issued a series of complaints and finally a second amended consolidated complaint and notice of hearing on April 23, 1981.[1] The complaint alleges, *inter alia*, that Beaumont and General Truck Drivers, Warehousemen and Helpers, Local 467, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereafter called the Union), were parties to a collective-bargaining agreement which contained a provision that was proscribed by Section 8(e) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.* (hereafter called the Act). Further, that on January 22, 1980, Beaumont terminated an employee who refused to cross a secondary picket line established by another union at a construction jobsite of one of Beaumont's customers, and the Union invoked and reaffirmed the unlawful provision of the collective-bargaining agreement by instituting and processing through arbitration a grievance of the discharge of the employee. The Union filed an answer in which it admitted certain allegations of the complaint, denied others, and specifically denied the commission of any unfair labor practices.

A hearing was held in this consolidated matter in Los Angeles, California, on November 12, 1981. The parties were represented by counsel and afforded full opportunity to examine and cross-examine witnesses and to present material and relevant evidence on the issues in controversy.[2] Briefs were submitted by the parties appearing at the hearing and have been duly considered.

Upon the entire record in this case, including the stipulations entered into by the parties at the hearing, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Beaumont is a California corporation engaged in the business of producing and supplying ready-mix concrete. It maintains its principal office in Beaumont, California, and a concrete batch plant located in Thousand Palms, California. In the normal course of its business operations, Beaumont annually purchases and receives goods and products valued in excess of $50,000 directly from suppliers located outside the State of California. The parties have stipulated, and I find, that Beaumont is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

General Truck Drivers, Warehousemen and Helpers, Local 467, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Beaumont and the Union were parties to a collective-bargaining agreement, effective September 1, 1977, to March 31, 1980, covering, among others, all of Beaumont's ready-mix drivers. (See G.C. Exh. 2). Article II, section 1, of the agreement provides:

[1] The final complaint also included allegations relating to a "CB" charge filed in this matter. Immediately prior to the hearing the Regional Director issued an Order severing the "CB" case and withdrew those allegations from the consolidated complaint.

[2] Sullivan did not appear at the hearing nor did counsel appear on his behalf.

> *Section 1.* No member or applicant for employment subject to the terms of this Agreement shall be employed for any lower wage than this Agreement calls for. Any employee may be discharged or disciplined for incompetency, inefficiency, insubordination or any other good cause; *provided, however, that no employee shall be discharged or discriminated against for upholding Union principles, including his refusal to cross a picket line (provided the Union has previously notified the Employer of such picket line)* . . . . [Emphasis supplied.]

Approximately 10 days prior to January 22, 1980, Laborers Local 1184 established a picket line at a construction jobsite in Palm Desert, California. C & L Concrete Company, a customer of Beaumont, was scheduled to perform concrete work at the jobsite. The facts disclose that shortly after the picket line was established someone from Local 1184 called Beaumont's dispatch office and informed the dispatcher that a picket line had been placed at the jobsite.[3] The dispatcher posted a handwritten notice in the dispatch office where the drivers received their orders. The notice identified the jobsite and stated a picket line had been established at that location.[4] On January 22, 1980, the job had progressed to the stage where it was scheduled for the first pour of concrete to be delivered by Beaumont. Ben Crum, a ready-mix driver, was dispatched from Beaumont's batch plant to the jobsite with a load of concrete mix. When he arrived at the jobsite, Crum saw the picket line. Thomas Daniel (president of Beaumont), Cory Walls (owner of C & L), and Mike Sullivan (Beaumont's labor consultant) were also at the jobsite when Crum arrived. Walls informed Crum where to discharge the concrete. At that point Crum refused to cross the picket line. Daniel instructed Crum to follow Walls' direction and Crum stated he would deliver the concrete anywhere, but he would not cross the picket line because it was against union principles.[5] Daniel then informed Crum that "if he did not want to drive the truck [across the picket line], the Company had no further use for his services." Crum left the truck and it was driven onto the jobsite by an employee of C & L, who then discharged the concrete. Crum returned to Beaumont's office and was given his final paycheck.[6]

The Union grieved Crum's discharge and on February 13, 1980, notified Beaumont of its desire to submit the dispute to arbitration. (G.C. Exh. 3.) A hearing was held before Arbitrator Joseph F. Gentile on January 12, 1981. At the arbitration hearing, Beaumont took the position that article II, section 1, was unlawful since it violated Section 8(e) of the National Labor Relations Act and that the arbitrator had "to address the question of the legality of the contract clause in order to determine its enforceability." The Union took the position that the Board was the appropriate forum to adjudicate the "legality" of this provision and that "the [a]rbitrator must determine the contractual propriety of [Crum's] termination based on an interpretation of the relevant portions of the [agreement]." On February 9, 1981, Arbitrator Gentile rendered his opinion and award in which he, in essence, agreed with the Union and declined to rule on the 8(e) issue.[7] He found, based on the contract provisions, that Crum's "exercise of his contractual rights" was proper and that Beaumont breached the terms of the agreement, including the terms of article II, section 1, when it discharged the employee. The award granted Crum reinstatement with full seniority and backpay. (G.C. Exh 5.)

The record reflects that Beaumont went into the United States District Court seeking to set aside and vacate the arbitrator's award. Beaumont's motion in this regard was denied by the District Court and, at the time of the instant hearing, Beaumont had filed and was scheduled to argue an appeal of the lower court's decision before the United States Court of Appeals for the Ninth Circuit. At no time during the district court proceedings did the Union, other than to oppose Beaumont's motion to vacate, seek to take any affirmative steps to enforce the arbitrator's award.

Concluding Findings

Basically, the Union defends against the allegations here on three grounds: (1) that Section 10(b) of the Act precludes consideration of this matter since the underlying charges were filed outside the 6-month limitation;[8] (2) the cited provision of the 1977–80 agreement is not proscribed by Section 8(e) of the Act, nor is there any factual proof that the picket line at the jobsite on January 22, 1980, was secondary in nature; and (3) even if the provision were within the ambit of Section 8(e), it falls within the construction industry proviso to that portion of the Act and is, therefore, lawful.[9]

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[3] The facts regarding the establishment of the picket line, the notification to Beaumont, and the events of January 22, 1980, are a syntheses of the testimony in the record and the "factual summary" contained in the arbitrator's award; referred to *infra.*

[4] The arbitrator found the posted notice did not contain any legal characterization of the picket line; i.e., "informational," "sanctioned," or "otherwise."

[5] Crum testified he had not been contacted by nor had he spoken to any representative of the Union prior to going to the jobsite in question.

[6] Prior to his discharge, Crum had been employed by Beaumont for extended periods of time on two separate occasions; initially for a period of 5 to 6 years, and for 3 years immediately preceding his termination on January 22, 1980.

[7] Arbitrator Gentile held that the 8(e) issue was not before him, in the absence of mutual consent by the contracting parties, and the Board was the proper forum for resolution of this question.

[8] Sec. 10(b) of the Act provides, in pertinent part:

> . . . *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . .

[9] The relevant portion of Sec. 8(e) provides:

> It shall be an unfair labor practice for any unfair labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in the subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work . . . .

Turning to the Union's first argument, it is clear from the controlling case law that this contention must be rejected. Crum was discharged on January 22, 1980, for refusing to cross the picket line at the jobsite. The Union grieved this termination, pursuant to the contract grievance procedure, through arbitration. It actively participated in an evidentiary hearing at the arbitration stage on January 12, 1981. There, the Union reasserted its position that Beaumont was bound by all of the provisions of the 1977–80 agreement, and that the termination of Crum violated those provisions. The underlying charges here were filed on January 26 and March 13, 1981, respectively, well within 6 months of the arbitration proceedings.[10]

The Board has held, with Court approval, that Section 8(e) forbids the "entering into" of an agreement whereby the employer agrees to cease doing business with another person, and that the maintenance, enforcement, and reaffirmation of such an agreement within the 10(b) period constitutes an "entering into" within the meaning of Section 8(e). *Chicago Dining Room Employees, Cooks & Bartenders Union, Local 42 (Clubmen, Inc., d/b/a Gaslight Club)*, 248 NLRB 604, 606 (1980); *Bricklayers and Stone Masons Union, Local No. 2, Bricklayers, Masons and Plasterer's International Union of America, AFL–CIO (Gunnar I. Johnson & Son, Inc.)*, 224 NLRB 1021 (1976); *International Organization of Masters, Mates and Pilots, AFL–CIO (Seatrain Lines, Inc.)*, 220 NLRB 164 (1975); *Carrier Air Conditioning Co.* v. *N.L.R.B.*, 547 F.2d 1178 (2d Cir. 1976); *Sydney Danielson* v. *International Organization of Masters, Mates and Pilots, AFL–CIO*, 521 F.2d 747, 754 (2d Cir. 1975); *N.L.R.B.* v. *Local Union No. 28, Sheet Metal Workers' International Association, AFL–CIO, et al.*, 380 F.2d 827, 829 (2d Cir. 1967); *Los Angeles Mailers Union No. 9, International Typographical Union, AFL–CIO [Hilboro Newspaper Printing Co.]* v. *N.L.R.B.*, 311 F.2d 121 (D.C. Cir. 1962). Here, the Union's demand, through the arbitral process, that Beaumont comply with the terms of the agreement constituted a reaffirmation of the disputed clause and a maintenance of its enforceability. *Chicago Dining Room Employees, supra.* Thus, the Union's actions and conduct during the 10(b) period resulted in an "entering into" within the meaning of Section 8(e).

Next, the Union's assertion that the language of the clause does not violate Section 8(e) is equally unfounded. In advancing this argument, the Union seems to be contending that there was no factual proof that the picket line involved here was in fact secondary.[11] The Union's argument here misses the point. The vice of the language of the clause, as contended by the General Counsel, is that it protects refusals to cross *any* picket line, whether primary or secondary, and, as such, is broad enough to apply to unlawful secondary picketing. It is irrelevant whether the Union only intended for the clause to apply to lawful primary picketing or whether, as the Union contends here, there had been no determination regarding the type of picketing engaged in at the jobsite. What is relevant is whether the "picket line" clause on its face is limited to lawful primary activity or whether its terms are so broad that it applies to unlawful secondary picketing as well. In the latter instance, the clause perforce violates the strictures of Section 8(e). *Bricklayers and Stone Masons Union, Local No. 2 (Gunnar I. Johnson & Son, Inc.)*, 224 NLRB 1021 (1976), enfd. 562 F.2d 775 (D.C. Cir. 1977); *International Union of Operating Engineers, Local Union No. 12, AFL–CIO (Robert E. Fulton)*, 220 NLRB 530 (1975); *Local 445, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Edward L. Nezelek, Inc.)*, 194 NLRB 579 (1971).

I find that the language of the clause in the instant case is overly broad in that it makes no distinction between lawful and unlawful picketing. It grants an employee the right to refuse to cross a picket line without any limitation as to whether the picketing is primary or secondary. The clause also precludes the employer from discharging or disciplining an employee for exercising this right of refusal. It follows, therefore, that the clause can be applied to unlawful secondary picketing without fear of any sanctions being imposed by the employer. Thus, on its face, the clause is proscribed by Section 8(e) unless it falls within the "construction industry proviso" relating to "onsite work."

In a recent case, the Board reaffirmed its longstanding holding that "the delivery of materials to a construction site does not constitute 'onsite' work." *General Drivers, Warehousemen and Helpers of America, Local Union No. 89, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Robert E. McKee, Inc.)*, 254 NLRB 783, 786 (1981). Although that case applied to a subcontracting clause it is equally applicable to this situation which involves a picket line clause. Accordingly, as the Board stated in *McKee*,". . . a [picket line] clause which purports to include the delivery of materials to the jobsite enjoys no protection under the construction industry proviso to Section 8(e)" (254 NLRB at 786, 787.)

In view of the above, I find that the clause contained in the 1977–80 agreement violated Section 8(e) of the Act. I further find that by reaffirming the enforceability of this clause at the arbitration proceeding on January 12, 1981, the Union "entered into" an agreement in violation of Section 8(e).

[10] Although the Union did not seek court enforcement of the arbitrator's award, it defended against Beaumont's motion to vacate the award in the United States District Court. In so doing, the Union was tacitly stating that the award was based on a valid interpretation of the contract provisions. I find this to be tantamount to a reassertion that the parties were bound by art. II, sec. 1, of the agreement in question.

[11] At this point, it should be noted that par. 12 of the complaint alleges that Crum was terminated for refusing "to cross a secondary picket line established by Laborers' Local Union No. 1184." As pointed out by the Charging Party, the Union's answer admitted this allegation. At the hearing in this matter, however, the parties stipulated that there was an informal Board settlement of the charges stemming from the picket line activities, including the charges against Local 1184. The parties further stipulated that there had not been a Board determination regarding the character of the picketing at the jobsite when Crum refused to cross the picket line; i.e., primary or secondary. Contrary to the Charging Party's position in its brief, I do not deem the pleaded answer of the Union to be an admission but, rather, find the stipulation to be controlling on this point.

CONCLUSIONS OF LAW

1. Beaumont Concrete Company is an employer within the meaning of Section 2(2) of the Act, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. General Truck Drivers, Warehousemen and Helpers, Local 467, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By entering into, maintaining, and giving effect to the picket line clause in its 1977–80 contract with Beaumont Concrete Company, which was interpreted by an arbitrator to protect an employee from discipline for refusing to cross a picket line at a jobsite, even though the clause on its face did not limit its application to primary picketing, the Respondent Union entered into an agreement in violation of Section 8(e).

4. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent Union has committed an unfair labor practice within the meaning of Section 8(e) of the Act, it shall be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Upon the foregoing findings of fact, conclusions of law, the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[12]

The Respondent, General Truck Drivers, Warehousemen and Helpers, Local 467, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Entering into, maintaining, giving effect to, or enforcing the picket line clause (art. II, sec. 1) contained in the collective-bargaining agreement in effect between the Respondent Union and Beaumont Concrete Company during the period September 1, 1977, through March 1, 1980.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at its business offices and meeting halls, copies of the attached notice marked "Appendix."[13] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by an authorized representative of the Respondent, shall be conspicuously posted immediately upon receipt thereof, and maintained for 60 consecutive days thereafter, in all places, where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Sign and mail sufficient copies of said notice to the Regional Director for Region 21 for forwarding to Beaumont Concrete Company for its information and, if it is willing, for posting at all locations where notices to its employees are customarily posted.

(c) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

[12] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[13] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT enter into, maintain, give effect to, or enforce the picket line provision in our 1977–80 contract (art. II, sec. 1) with Beaumont Concrete Company, or with any other employer, to the extent that said provision violates Section 8(e) of the National Labor Relations Act.

GENERAL TRUCK DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL 467, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA